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ORDWAY, C. (2013). Why Being a World Leader Means Staying Ahead of the Game: Supporting ASADA's Enhanced Powers. *ANZSLA Commentator*, 87, 9-12.

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Why Being a World Leader Means Staying Ahead of the Game: Supporting ASADA's Enhanced Powers

(March 2013)

(2013) 87 The Commentator 2

Catherine Ordway is a Sport & Anti-Doping Consultant and Lecturer and PhD Candidate, National Institute of Sport Studies, University of Canberra

Why Being a World Leader Means Staying Ahead of the Game: Supporting ASADA's Enhanced Powers

John Coates, President of the Australian Olympic Committee (AOC) yesterday backed up his calls from as early as 2000 for the Australian Sports Anti-Doping Authority (ASADA) (and its predecessor) to be granted enhanced investigative powers:¹

*"We don't have to sit back and wait for others to follow our lead," Coates replied when asked whether the government's proposed extension of ASADA's existing powers to enable its director to coerce witnesses to provide information even at the risk of self-incrimination were not sufficient.*²

Coates was appearing before the Senate Rural and Regional Affairs and Transport References Committee (Senate Committee) currently considering whether the ASADA Act should be amended to allow for, amongst other things, the ASADA CEO to compel witnesses to give evidence.³ The ASADA Amendment Bill 2013 was introduced into the Senate the night before the Australian Crimes Commission (ACC) dropped a bomb on Australian sport in the form of its: "Organised Crime and Drugs in Sport" report on 7 February 2013.⁴ The report claimed that "widespread" doping is occurring in Australia:

*The ACC has found, on the basis of a limited and focused examination of one component of the PIEDs market, that the market has evolved significantly in recent years to include peptides and hormones. These substances, which are WADA-prohibited, are being used by professional athlete in a number of professional sporting codes. Organised crime has been found to have a tangible and expanding footprint in this market, and their activity is being facilitated by some coaches and support staff of elite athletes, who have orchestrated and/or condoned the use of prohibited substances and/or methods of administration.*⁵

Following the first reading of the Bill, the Bill was immediately referred to the Senate Committee on 7 February for consideration. Interested parties were invited to make submissions to the Senate Committee in relation to the Bill by 21 February, and a public hearing was held on 1 March 2013.⁶ I took the opportunity to provide a submission in support of the Bill, as did a number of other interested parties in addition to ASADA and the AOC including: the Executive Director of the Coalition of Major Professional and Participation Sports (COMPPS) Malcolm Speed, the ACC CEO John Lawler, Exercise and Sports Science Australia executive officer Anita Hobson-Powell, and the Australian Sports Commission CEO Simon Hollingsworth who also appeared before the Committee to respond to questions on the proposals featured in the amended bill. An interesting alternate view was presented by Tony Nolan SC, Chair of the Commercial Bar Association, where he suggested that, in addition to substances on the Prohibited List, Athletes should be banned from using any

substances which have not be approved for human consumption, which would then exclude experimental and veterinary drugs.

The international performance enhancing drug trade is reportedly worth billions⁷, and it is clear that doping cannot be detected by testing alone. The World Anti-Doping Agency (WADA) promotes Australia as having developed a revolutionary anti-doping model that solidifies cooperation between the anti-doping authority and other government agencies. WADA promotes the "Australian Model" on its website and in its publications⁸. WADA is also of the view that a key component in the investigative and intelligence capabilities is the establishment and maintenance of relationships between investigative agencies across Government. This position is reflected in WADA's "Guidelines for Coordinating Investigations".⁹ ASADA's vision is: "to be the driving force for pure performance in sport". ASADA's purpose is to: "protect Australia's sporting integrity through the elimination of doping".¹⁰ Outspoken scientist and anti-doping campaigner, Dr Mike Ashenden was quoted last month as expressing his disappointment in ASADA as: "a prodigy that has not yet delivered on its exciting potential . . . for some reason, things just haven't clicked, and the results they've produced so far have been pretty modest".¹¹

The challenge for ASADA is to disrupt and detect doping (anti-doping rule violations in the Code terminology) through information and intelligence obtained from the following:

- Athletes and Athlete Support Personnel as defined by the Code, thereby within ASADA's jurisdiction;
- Government organisations, including Law Enforcement Agencies [LEAs]
- Non-governmental organisations and professional associations
- Individuals not within the jurisdiction of the ADO.

ASADA currently has no power to compel any of the classes of person above to provide it with information which ASADA may be able to use to carry out its functions. ASADA must therefore rely on information derived from sport anti-doping rules and cross-government agreements. The ACC has referred the matters outlined in its report to the State and Federal police forces, and to ASADA (in relation to anti-doping). Unfortunately ASADA cannot compel the Athletes or Athlete Support Personnel featured in the ACC "Organised Crime and Drugs in Sport" Report¹² to provide any further information, so unless they voluntarily come forward, there is no guarantee that any of the matters identified can be progressed. The Senate Committee has been tasked with reporting back to the Senate by 12 March 2013. The progress of this Bill is extraordinarily quick and appears to have been designed to ensure that ASADA is granted the powers in recognition that ASADA is otherwise unable to act on the intelligence provided to it by the ACC.

Many of the Senate Committee questions were focused on seeking examples of where ASADA unable to adequately exercise its functions, namely: where ASADA was unable to determine how Athletes obtained the prohibited drugs, particularly where that might have involved a person(s) defined as 'Athlete Support Personnel' under the WADA Code, and whether other Athletes had used the same, or other drugs. Representatives from the Australian Athletes Alliance, including Brendan Schwab (General Secretary), claimed that the current contracts in place between the Athletes and the National Sports Associations were sufficient to compel that evidence to be provided to ASADA. Unfortunately that has not been my experience in prosecuting anti-doping rule violations since 1998. John Coates cited the example of one case I was involved with from where Werner Reiterer refused to name other athletes involved in doping, despite publishing a book promoted as the "inside story of drugs and sport".¹³ In the Court of Arbitration for Sport at the same time, the cases of cyclists Tim Lyons and Tim O'Shannessy¹⁴ also hit a block when we attempted to call the vet who reportedly gave the athletes advice on using testosterone and clomiphene (a female fertility drug). Even in the case of illicit, rather than performance enhancing, drugs, which attracted a significant level of questing from the Senators involved in the public hearing on 1 March, Wendell Sailor's contractual arrangements did not assist ASADA in determining whether Sailor had obtained the cocaine he used from other Athletes or Athlete Support Personnel,¹⁵ despite being granted powers to investigate doping allegations under the *ASADA Act* in 2006.

Information Sharing with Sports Organisations:

In order to investigate those matters within its jurisdiction, referred to it by the ACC or otherwise, ASADA must rely on the agreements in place with the major National Sports Organisations (NSOs) requiring the NSOs to: "immediately advise ASADA of any alleged anti-doping rule violations and [to] provide assistance to ASADA in any investigation that ASADA might reasonably request."¹⁶ If an NSO fails to comply with this agreement, ASADA only has limited legal (eg: breach of contract)

and political avenues to pursue (eg: embarrassment in the media, with the Minister for Sport or the Australian Sports Commission). The NSO in turn has jurisdiction over the Athletes and Athlete Support Personnel via their membership contracts (club, state and then national) or employment arrangements.

Information Sharing with External Organisations (including LEAs):

ASADA's legislation includes expanded information disclosure provisions and specific references to allow ASADA to share information with sports and law enforcement bodies, eg: Australian Customs, the State and Federal Police, Therapeutic Goods Administration, National Anti-Doping Organisations and International sports Federations.¹⁷ This is a one directional power, which needs to be replicated in each of the agencies ASADA wishes to receive information from (including through MoUs). It was intended that this information would enable ASADA to identify athletes or support personnel suspected of doping, and then concentrate its resources on them, whether via further investigation or targeted drug testing. Sharing information between government agencies is consistent with the 'Whole of Government' approach.¹⁸

Proposed Powers Will Benefit ASADA:

An expansion to ASADA's powers as anticipated by the 2013 Bill will assist to overcome one of its current challenges: reliance on LEAs. In order to have matters thoroughly investigated, ASADA must attract the attention of organisations which have scarce resources and higher priorities for community safety (eg: murders, child pornography, and the trafficking of non-performance enhancing drugs, including ice and heroin). In my submission to the Senate Committee I have also suggested that it may also be of benefit to ASADA for ASADA to be granted powers of 'search and seizure', and for the recently introduced information-sharing facilitation mechanism, the National Collaboration Framework, be used more effectively in relation to ASADA,¹⁹ including extending the Privacy Commissioner's data-matching in accordance with information handling guidelines. I have also suggested that we have another look at whether ADRVs should be made criminal offences under the *Crimes Act*, and thereby whether other benefits may flow from that, including applying the relevant provisions of the *Proceeds of Crime Act* to ASADA. If this suggestion is adopted, then this will also serve to overcome many of the objections raised by the Commercial Bar Association, and human rights groups who do not support criminal sanctions being imposed on what are essentially contractual matters between the Athlete and their sport.

¹ See the Australian Olympic Committee submission to the ASADA Bill, 2013 dated 21 February 2013

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=rrat_ctte/sports_anti_doping/submissions.htm

² W Smith, "ASADA Powers Woefully Inadequate: John Coates", *The Australian*, 1 March 2013,

<http://www.theaustralian.com.au/sport/asada-powers-woefully-inadequate-john-coates/story-e6frg7mf-1226588427897>

³ http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s902

⁴ <http://www.crimecommission.gov.au/publications/other/organised-crime-drugs-sport>

⁵ <http://www.crimecommission.gov.au/publications/other/organised-crime-drugs-sport> at p36

⁶ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=rrat_ctte/sports_anti_doping/submissions.htm

⁷ WADA Media Release, 'Interpol and WADA Team Up to Fight Cheats', 2 October, 2006, <http://www.wada-ama.org/en/newsarticle.ch2?articleId=3115331>. Eg: 'International Law Enforcement Operation Targets Underground Manufacture of Anabolic Steroids, "Operation Raw Deal" Nets 124 Arrests Nationwide To Date', US Department of Justice, 24 September 2007, http://www.usdoj.gov/opa/pr/2007/September/07_crm_753.html

⁸ <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=694>. See also the joint WADA & Interpol press release: "WADA Applauds Actions Targeting the Illegal Manufacture and Distribution of Doping Substances New Era in Anti-Doping Must Involve Coordination with Law Enforcement" and Ings R, (2007), *Play True*, WADA Issue 1, p10-11 http://www.wada-ama.org/rtecontent/document/PlayTrue2007_BeyondtheAthlete_En.pdf

⁹ <http://www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Investigation--Trafficking/Investigations/Guidelines/>. See also Senator George Mitchell in his findings into the illegal use of steroids in Major League Baseball (USA): Mitchell GJ, (2007) "Report To The Commissioner Of Baseball Of An Independent Investigation Into The Illegal Use Of Steroids And Other Performance Enhancing Substances By Players In Major League Baseball", <http://www.primerahora.com/XStatic/primerahora/docs/espanol/informemitchell4.pdf>

¹⁰ www.asada.gov.au

¹¹ S Lane, "ASADA: Is it Working", *Sydney Morning Herald*, 23 February 2013, <http://www.smh.com.au/sport/asada-is-it-working-20130222-2ex1r.html#ixzz2MC344dup>

¹² <http://www.crimecommission.gov.au/publications/other/organised-crime-drugs-sport>

¹³ W Reiterer, *Positive*, Pan Macmillan Australia Pty Ltd, Sydney, 2000

¹⁴ L McGregor, "Aussie cyclists out of Games after drug ruling", *AM, ABC Local Radio*, 26 January 2000, <http://www.abc.net.au/am/stories/s95481.htm>

¹⁵ Sailor received a 2 year ban for a positive test for cocaine in 2006:

<http://www.rfu.com/thegame/antidoping/education/~media/files/2009/antidoping/case%20study%20-%20wendell%20sailor%20-%20cocaine.ashx>

¹⁶ An example of this type of agreement is found at Appendix D of the "Cycling Australia Review" conducted by the Hon James Wood AO QC released on 14 January 2013 <http://www.regional.gov.au/sport/resources/reports/review-of-cycling-australia.aspx>

¹⁷ ASADA Act, 2006, www.comlaw.gov.au

¹⁸ See also the National Collaboration Framework cited above. W G Carson, "Whole of Government and Crime Prevention for Victoria", August 2003, Department of Criminology, University of Melbourne, p1-40, http://www.criminology.unimelb.edu.au/staff/kit_carson/whole-government-crime-prevention.pdf. H Goldstein, "Problem-oriented policing: the basic elements" in *Problem-Oriented Policing* (1990), McGraw-Hill, New York, p32-49 at p47

¹⁹ <http://agimo.gov.au/collaboration-services-skills/national-collaboration-framework/>